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In the Supreme Court of the United States

OCTOBER TERM 1955

No. 764

MARCO REGINELLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of New Jersey (Pet. App. 24–31) is reported at 20 N. J. 266, 119 A. 2d 454. The opinion of the County Court (R. 96–107) is reported at 36 N. J. Super. 455, 116 A. 2d 214. The recommendation, findings of fact, and conclusions of law of the Naturalization Examiner appear at R. 51–72.

JURISDICTION

The judgment of the Supreme Court of New Jersey was entered on January 3, 1956. The petition for a writ of certiorari was filed on

March 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

QUESTIONS PRESENTED

The Supreme Court of New Jersey, upon appeal, reversed a County Court judgment granting naturalization, because of the failure of the petitioner to sustain the burden of showing good character. The County Court had not taken testimony but had acted upon the same written transcript of testimony before the Naturalization Examiner that was later acted upon by the Supreme Court. The questions presented are:

1. Whether, upon the particular facts, the state Supreme Court's review upon appeal involved an exercise of powers different from those under federal appellate procedure, or, if different, whether the scope of review in this case was invalid as a violation of the constitutional requirement of uniformity for naturalization.

2. Whether the government, in a direct appeal based on the applicant's failure of proof within the naturalization proceeding itself, is subject to the requirement imposed where the government institutes a collateral attack on a completed citizenship proceeding, *i. e.*, that citizenship cannot be taken away except upon clear and convincing evidence.

3. Whether the state Supreme Court, in evaluating petitioner's current moral character, placed

any improper reliance on petitioner's earlier conduct and criminal record.

STATUTE INVOLVED

Section 307 of the Nationality Act of 1940, 54 Stat. 1142, 8 U. S. C. (1946 ed.) 707, provides in part:

> (a) No person, * * * shall be naturalized unless such petitioner, * * * during [the period from five years preceding the date of filing the petition to the time of admission to citizenship] has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

STATEMENT

Petitioner seeks review of the judgment in which the Supreme Court of New Jersey (Pet. App. 31) reversed the judgment of the County Court (R. 110–111) and denied petitioner's application for naturalization (R. 3–4).

The instant petition for naturalization is the fourth filed by petitioner, the others having been filed in 1937, in the Court of Common Pleas, Sunbury, Pennsylvania, and in 1944 and 1950 in the United States District Court at Camden, New Jersey. The first petition was denied for lack of prosecution, the second upon the District Court's finding that petitioner was not of good

moral character, and the third upon petitioner's own motion (R. 3, 61).

The record in the present proceeding may be summarized in chronological order as follows:

Petitioner entered the United States for permanent residence in 1914 (R. 2). According to the list of arrests submitted by him, his first arrest was three years later in 1917, as a suspicious character in Philadelphia. He was discharged by the magistrate (R. 10–1, 62). In 1920, he was fined $300 at Trenton, New Jersey, upon a liquor offense (R. 11, 62). In 1923, he was arrested in Philadelphia as a suspicious character and discharged (R. 11–12, 2). In 1924, he was fined $100 at Pittsburgh, Pennsylvania, on a gambling charge (R. 12–16, 6). In 1924, he was arrested as a suspicious character in Philadelphia and discharged (R. 16, 6). In 1926, he was convicted of an $1,800 fraud in gambling in Philadelphia; he made restitution and was sentenced to a year's imprisonment (R. 16–17, 62).

In 1930, petitioner was arrested in Camden, and charged with illegal possession of firearms, including a pistol and shotgun (R. 17–18, 62); in 1930, he was arrested in Philadelphia for frequenting a gambling house (R. 18, 62); in 1931, he was arrested in Philadelphia as a suspicious character and investigated for murder (R. 18–19, 62); in 1931, he was arrested in Camden as a material witness (R. 18–19, 2). In these instances he was discharged. In 1933, he was fined $100 at

Camden upon a charge of aiding a lottery (R. 19–20, 62). In 1934, he was arrested on suspicion of running a lottery (R. 20, 62) and in 1936 he was arrested as a suspicious character in Philadelphia (R. 20, 62). In these instances he was again discharged. On January 5, 1937, he was arrested at Camden under a law against congregating with persons with criminal records, sentenced to six months' imprisonment and fined $100, which was reversed on appeal (R. 20–21, 63).

On June 2, 1937, petitioner filed a petition for naturalization in the Court of Common Pleas at Sunbury, Pennsylvania. The petition was denied on September 5, 1939, for want of prosecution (R. 61). In 1942, petitioner was arrested as a material witness in Camden, in an investigation of the murder of one Lessey, who was associating with Louise Abate (R. 21–22, 63). He was discharged but in the same year was convicted of a Mann Act violation involving the transportation of Louise Abate, sentenced to six months' imprisonment and fined $1,500 (R. 22–23, 63). In the same year, he was arrested as an enemy alien and released on parole (R. 23).

On October 10, 1944, petitioner filed a petition for naturalization in the United States District Court at Camden. The petition was denied for failure to prove moral character, the District Judge relying specifically upon the above Mann Act conviction during the statutory period, and stating, in a written opinion filed on October 17,

1949, "it further appears that this petitioner has had many close escapes from the clutches of the law, and that his only means of support is that of a gambler" (R. 61, 64; *Petition of Reginelli*, 86 F. Supp. 599, 600). On March 23, 1950, petitioner filed another petition for naturalization in the same court, which was denied on his own motion in August of the same year (R. 61).

On May 28, 1948, in Camden, petitioner was involved in a hit-and-run automobile accident at 2:55 a. m. in which he hit another car, injuring two persons. He was chased by a police car and arrested one mile from the scene. He was reported as causing trouble to the arresting officers and was taken to headquarters in a police van. He made settlement with the injured persons and was not booked (R. 25–26).

Petitioner admitted income for the years 1947 through 1951 of $40,000 to $50,000 per year and $25,000 for 1952 (R. 30, 32). He explained $2,400 per year as income from a property, $5,200 as salary from a plastics manufacturing company in which he became a partner in 1948 and in which he claimed a 27 percent interest, and $50 interest on government bonds (R. 31–32, 64–65). He also claimed a distribution of profit from the plastics firm in 1950 or 1951 in the amount of $17,000 (R. 31–32). As to the remaining, major portions of the income, petitioner asserted that wagers on horse races were the source (appar-

ently the sums above $2,450 in 1947, above $24,650 in 1950 or 1951 and above $7,650 in the remaining four years).

On July 19, 1950, petitioner executed a declaration of intention, in which he listed the additional names, "Marco Reginello, Mark Di Nardo, Mark Di Luis." He stated his residence as Camden, New Jersey, and his occupation as "Partner—Plastic Products", and stated that he had a daughter, born 1923 (R. 1).

On August 15, 1952, petitioner's car was involved in an accident. The Naturalization Examiner's information was to the effect that petitioner left his car and fled in another car in which he was caught by the police, in company with one William Weisberg, a notorious gambler and numbers man (R. 27, 29). Petitioner stated that he had loaned his car to a friend, that Weisberg came to petitioner's house to tell him of the accident, and that he had voluntarily driven to the scene with Weisberg (R. 27–30).

On September 23, 1952, petitioner executed the instant application for naturalization. He did not state his former aliases, and now stated his residence to be Margate City, New Jersey, and that he had "no" children (R. 3). The appended affidavit of witnesses Siniscalco, physician, and Di Luigi, bottler, residing in Camden and Atlantic City, respectively, stated personal knowledge, *inter alia,* that petitioner had been a person

of good moral character and had resided at Margate City "continuously since January 1, 1940" (R. 4). Cf. petitioner's statement of residence in Camden in 1950 (*supra*, p. 7).[1]

At the hearing before the Naturalization Examiner on April 10, 1953, at which petitioner was accompanied by counsel, petitioner testified, upon interrogation by the Examiner, that he had a home at Camden where he stayed "occasionally," that his business was only about six or eight miles from Camden, and that he stayed at Margate weekends "[m]ostly, if I am around" (R. 8–9). He also testified that he had lived in Margate City "since about March, 1951" (R. 49).

Petitioner explained that he had used the various aliases for his "people's sake * * * not to let them know that I was pinched." He stated inability to remember whether he used additional names, or, specifically, the name Canterano (R. 9–10).

As to most of the arrests, he recalled details of the places and various incidents of arrests (R. 11–12, 14, 16–21), and admitted operating a lottery "off and on" in 1933 or 1934 (R. 20), but could not remember whether he was engaged in bootlegging at the time of one arrest (R. 11),

[1] On June 21, 1955, petitioner moved to amend his petition to correct two typographical errors, but no amendment was offered as to the witnesses' or petitioner's statements concerning petitioner's residence (R. 5).

what the police officers charged in another instance (R. 14), what his occupation was at the time (R. 14), or what additional charges were involved in the fraud and restitution case (R. 17). He could not remember the names of the murdered men concerning whom he was investigated on two occasions, although in one case the victim was associating with petitioner's girl friend (R. 18, 22). He did not know whether he was aiding the running of a lottery, or was a member of the lottery club, or taking numbers or banking (R. 19–20). He could not remember whether he was taken to police headquarters in a police van after the hit-and-run accident of 1948 (R. 23–26), whether he had been to the Garden State Track in the past year (R. 33), whether he had been to the Atlantic City race track (R. 33), whether he had seen Louise Abate within the past year (R. 49), how long he had lived with the mother of his child prior to the birth (R. 53), and whether he had had sexual relations with any other women (R. 59). Petitioner totally refused to answer whether he had had sexual relations with Louise Abate since the Mann Act conviction, asserting his constitutional privilege (R. 51–52, 60).

At the hearing, petitioner was also questioned by the Examiner on his claim that he had won large sums by betting on horse races (*supra,* pp. 6–7). He was unable to name any horse upon

which he had wagered, although asserting that he had sometimes won as much as $4,000 on a single horse (R. 30, 32–35, 86–87). He said that he had racing programs at his home, showing bets, and agreed to furnish them to the Examiner, but this was never done. At the later appearance before the County Court Judge, petitioner's attorney stated "the reason it wasn't followed up is that they started deportation proceedings which took a great deal of time and required an intervening time between that and this." The claimed programs were not presented in court (R. 35, 60, 89).[2]

The Examiner reported, as of March 9, 1955, that investigation conducted by the Immigration and Naturalization Service revealed that:

> [T]he principal associates of the petitioner are notorious underworld characters. He admits knowing some of these people but says his acquaintanceship is merely casual * * * [R. 66; and see petitioner's own admissions, R. 29, 36–37, 42, 46–47].

The report also stated that (R. 63):

> [Petitioner] is well known to all the law enforcement officials in southern New Jersey and southeastern Pennsylvania and is reputed by them to be an underworld figure of stature and one of the leaders of the numbers and gambling business as well

[2] The deportation proceedings failed because the Mann Act conviction was held not to involve moral turpitude (R. 88).

as having connections with other forms of vice.

The Examiner concluded and reported that petitioner had not sustained the burden of proof that he had been a person of good moral character for the statutory five-year period (R. 72).

The judge of the County Court relied entirely upon the transcript of testimony before the Examiner, and took no testimony in person, despite the Examiner's suggestion that the judge question petitioner more closely (R. 78, 91). Petitioner, when invited to do so, presented no testimony (R. 91, 93). The judge granted naturalization, relying upon the character witnesses and upon the assumption that government facilities would "certainly" have been able to afford affirmative proof of illegal conduct or income received by petitioner (R. 100, 105). The judge admitted that "the record is not as full as it should be as to the petitioner's actual conduct during the crucial five year period" (R. 105) and that petitioner, in the grant of naturalization, had "been given the benefit of the doubt" (R. 95). The judge further stated that he would not determine the truth of petitioner's explanation of his large income (R. 105), and concluded that he "must assume" that the petitioner was "sincere" in his sworn statements (R. 106).

The Supreme Court of New Jersey, "[d]eeming it a cause of public concern" (Pet. App. 25), granted certification of the government's appeal

prior to argument in the Appellate Division (Pet. App. 25). The court, without relying upon petitioner's refusal to answer as to recent relationships with the woman who had been involved in the Mann Act conviction (Pet. App. 27), and without relying upon the 1948 hit-and-run conduct (Pet. App. 27), held that, upon examination of the same record which had been the County Court judge's sole basis of judgment, petitioner's testimony was "unworthy of belief" and that his "attempted explanation" of his huge income as derived from betting on horses, without being able to name a single horse, was not to be believed (Pet. App. 30). The court stated (Pet. App. 30–31):

> * * * Throughout he was evasive and at times to a point of outright untruthfulness. It was manifest he had no desire or intention to make a complete disclosure to the examiner of his past record and his present activities but sought to withhold as much information as he could wherever it was possible.
>
> * * * * *
>
> * * * His attitude and general demeanor were wholly unconvincing to portray a reformation from an admittedly badly spotted past to a forthright, reasonably clean status * * *
>
> [H]is failure in his obligation to sustain [the burden of proof] is evident throughout the record before us. * * *

ARGUMENT

1. A basic misconception permeates petitioner's effort to have this Court review an essentially factual matter. The petition assumes that the Supreme Court of New Jersey simply reversed after a *de novo* consideration of oral testimony heard by the trial court, and that no question of law was involved. But what is actually involved is the failure of the County Court to recognize that the burden of proof was petitioner's to show himself qualified for citizenship—a failure which amounted to a mistake of law—and then a reappraisal by the appellate court, under the proper standard, of the same written record that was before the lower court. There is nothing novel about such appellate power.

(a). Petitioner had the responsibility of showing that his admitted criminality of the past had been supplanted by good moral character. As pointed out in the opinion of the Supreme Court of New Jersey (Pet. App. 29):

> On a petition for naturalization, the burden of proving good moral character and the applicant's eligibility for citizenship rests upon him, and any doubt concerning the qualifications must be resolved against the applicant and in favor of the United States. *U. S.* v. *MacIntosh,* 283 U. S. 605 [626], 75 L. ed. 1302 (1931); *U. S.* v. *Schwimmer,* 279 U. S. 644 [649–650], 73 L. ed. 889 (1929); *U. S.* v. *Manzi,* 276 U. S. 463 [467], 72 L. ed. 654 (1928);

Tutun v. *U. S.*, supra [270 U. S. 568, 578]; *Brukiewicz* v. *Savoretti*, 211 F. 2d 541 [543] (5th Cir. 1954).

In petitioner's case this burden had to take into account the history of his prior efforts to attain citizenship. He had attempted to obtain naturalization before three judges in Pennsylvania and Camden, New Jersey, during the years before he claimed residence in Margate City within the jurisdiction of the instant County Court. He had himself abandoned his 1937 and 1950 petitions, and his remaining petition had been rejected by a United States District Court in October 1949 in an opinion referring, not only to petitioner's Mann Act conviction, but to the further fact that petitioner's only means of support was that of a gambler (86 F. Supp. 599, 600).

On the instant application, less than three years later, the County Court judge misconceived petitioner's burden to show good moral character in a clear and forthright exposition of all the facts, including source of income, and instead, in a clear error of law, the court gave petitioner "the benefit of the doubt" on the theory that the court "must assume" that the petitioner was "sincere in his sworn statements." The judge relied upon affidavits of the two character witnesses—witnesses who swore to petitioner's residence within the jurisdiction of the County Court since 1940, when petitioner himself set the time ten years

later, in 1950. And the judge further erroneously assumed that the government was charged with bringing in witnesses to negative an exposition by petitioner that was properly characterized by the Supreme Court of New Jersey as "evasive and at times to a point of outright untruthfulness," and "unworthy of belief."

(b). Moreover, even if the action of the New Jersey Supreme Court be regarded solely as a review of the facts, the right of an appellate court to take cognizance of a too-flagrant deficiency in evidence is not novel and does not show lack of uniformity between state and federal practice. The basic federal rule has been stated in *United States* v. *Gypsum Co.*, 333 U. S. 364, 394–395:

> [Rule 52 (a) of the Rules of Civil Procedure] prescribes that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. * * * The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court.

> The findings were never conclusive, however. A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

And see, *e. g.*, the recent extensive reappraisal of evidence by this Court in *Remmer* v. *United States,* this Term, No. 156, slip opinion, pp. 3–5. It has also been held by several Courts of Appeals that the scope of appellate review is greater where the testimony before the trial court was by deposition, as here, or the evidence was documentary. E. g., *Orvis* v. *Higgins*, 180 F. 2d 537 (C. A. 2), certiorari denied, 340 U. S. 810; *Dollar* v. *Land,* 184 F. 2d 245 (C. A. D. C.), certiorari denied, 340 U. S. 884; and cases cited by the Advisory Committee's Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, October 1955, at pp. 52–53.

Applying the federal standard, the New Jersey Supreme Court was clearly justified in overturning the County Court's ultimate finding of good moral character. Mere passage of time since the last conviction, petitioner's own unsupported assertions, and the conclusions of the two character witnesses could not constitute affirmative proof of petitioner's current good moral character, in the face of a continuing, conceded huge income of

which the greater part is unaccounted for except by an "explanation" that the tens of thousands of dollars were the product of wagers on horses—without ability to recall the name of a single horse upon which a wager was placed—and in the face of the inconsistencies and gaps in petitioner's other "explanations."[3]

2. More fundamentally, petitioner's whole concept of what is required under the uniformity provision[4] is in error. The Constitution does not wipe out all differences in court procedure. *Bindczyck* v. *Finucane*, 342 U. S. 76, on which petitioner relies (Pet. 8) for the contrary view, is inapposite. That case did not deal with a direct appeal, as here, where the challenge is directly to the judgment and record, for a failure of sufficient evidence. *Bindczyck* dealt with an effort collaterally to set aside a judgment of naturalization upon matters outside the record, in which case the exclusive denaturalization proce-

[3] This Court has stated the always-present reservation that there is no requirement "that uncontradicted evidence of a witness must be accepted as true on the hearing." *Hawk* v. *Olson*, 326 U. S. 271, 279. And see *Harpin* v. *Johnston*, 109 F. 2d 434, 435 (C. A. 9), certiorari denied, 310 U. S. 624; *Albert ex rel. Buice* v. *Patterson*, 155 F. 2d 429, 432 (C. A. 1), certiorari denied, 329 U. S. 739; *Farrell* v. *Lanagan*, 166 F. 2d 845, 847–848 (C. A. 1), certiorari denied, 319 U. S. 776; *Ex parte Farrell*, 189 F. 2d 540, 545 (C. A. 1), certiorari denied, 342 U. S. 839.

[4] Const., Art. I, Section 8, Clause 4: "The Congress shall have power * * * To establish an uniform Rule of Naturalization * * *."

dures of Section 338 of the Nationality Act of 1940 were held to be applicable because of the purpose, implicit in that section and in its history, to establish a uniform procedure in all essentially collateral challenges of naturalization.

With respect to direct appeal upon the record itself and to comparable matters of procedure, the situation remains different. Naturalization proceedings have long been held in state courts, and the right to appeal was established by this Court in 1926 (*Tutun* v. *United States*, 270 U. S. 568). Successive enactments of naturalization legislation thereafter, which provided no exclusive appeal procedure or appeal criteria, must be deemed to have left appeal to the known variants of the state and federal courts, in recognition that those variants created no substantial or basic non-uniformity within the essence of the uniformity requirement. This was clearly stated in the *Bindczyck* decision (342 U. S. 76, 87):

> * * * Of course there are differences among State judiciaries as to the time within which an appeal can be taken. But the differences are within a narrow and unimportant range compared with the enormous and quixotic differences relating to a court's control over its judgments on the score of fraud or illegality. It is one thing to allow some play for the joints in a statutory scheme like the Nationality Act, enforceable by both State and federal courts. It is quite another to inject a wholly dis-

> locating factor by incorporating the diverse State rules for vacating judgments into the revocation process, which Congress specifically and comprehensively dealt with in § 338.
>
> * * * The bill before Congress in 1906 provided for a uniform mode of appeal to the United States Circuit Courts of Appeals from naturalization judgments rendered by State, as well as federal, courts. H. R. 15442, 59th Cong., 1st Sess., § 13. Constitutional doubts and the practical problems which such an anomalous procedure would raise led to the omission of this section, leaving appeal procedure to the States. 40 Cong. Rec. 7784–7787. * * *

3. There is likewise no merit in petitioner's effort to analogize the instant direct appeal on the naturalization record to attempts to denaturalize or expatriate, once citizenship has been granted in a completed naturalization proceeding, for matters outside the record. The petition contends (Pet. 9) that the Supreme Court of New Jersey should have required "clear, convincing and unequivocal evidence" to "deprive of citizenship," invoking *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665, and *Gonzales* v. *Landon*, 350 U. S. 920. But none of these cases involved appeals of the original acquisition of citizenship; they were collateral challenges to citizenship long after the citizenship had been established by com-

pleted proceedings, or (as in *Gonzales*) established by the incontestable factor of birth in the United States. Petitioner's contention is, in reality, an attempt to overturn, so far as the government is concerned, the right of direct appeal settled by the *Tutun* case and to give a special, unwarranted status to the initial awarding of naturalization by the *nisi prius* court.

4. Petitioner also seeks to inject a semblance of conflict as to the effect of events occurring prior to the statutory period during which an applicant for citizenship must prove good moral character. The asserted conflict as to the 1940 Act is a matter of language and not of reality, and it is in no sense posed in the instant case.[5] While the Supreme Court of New Jersey expressed approval of rulings permitting reliance upon earlier events, the decision clearly and squarely rests upon petitioner's failure to account for his current income and his evasive and less-then-candid conduct at the Examiner's hearing—in short, upon his failure to sustain the burden of proving his good moral character (Pet. App. 28–31). Petitioner's earlier history merely emphasized the weight of his burden of proof, as well as the character of his current conduct.

---

[5] Section 316 (e) of the Immigration and Nationality Act of 1952, 66 Stat. 242, 243, 8 U. S. C. (1952 ed.) 1427, provides that the naturalization "court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition, but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to that period."

CONCLUSION

The decision of the Supreme Court of New Jersey is a correct disposition of an essentially unique factual problem. No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
J. F. BISHOP,
Attorneys.

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